

**BEFORE THE
NATURAL RESOURCES COMMISSION
OF THE
STATE OF INDIANA**

IN THE MATTER OF:

RECODIFICATION OF 312 IAC 6)	Administrative Cause
GOVERNING NAVIGABLE)	Number: 09-001W
WATERWAYS)	(LSA Document #09-152(F))

RECOMMENDATION FOR FINAL ACTION ON READOPTION OF RULES

A. INTRODUCTION

For consideration is the final adoption of the recodification of the navigable waterways rule article (312 IAC 6). The article includes Rule 1—Applicability; Rule 2—Definitions; Rule 3—Shipwrecks and Other Historic Sites; Rule 4—Marinas; Rule 5—Mineral Extractions; Rule 6—General Authorization for Beach Nourishment to Lake Michigan; Rule 7—Emergency Construction Activities in Lake Michigan; Rule 8—Placement of Permanent Structures in Lake Michigan. The text of 312 IAC 6 can be accessed through the Legislative Services Agency website at <http://www.in.gov/legislative/iac/T03120/A00060.PDF>.

In 2002, the Natural Resources Commission approved delegations of authority with respect to recodifications. Where no amendments are proposed, and rules would be readopted in their current form, the Director of the Division of Hearings may approve preliminary action. The standard practice would be to readopt by article. The Commission retained authority to take final action on recodifications.

No amendments were proposed to 312 IAC 6, and the rule article would be readopted in the current form. The Director of the Division of Hearings approved preliminary action. 312 IAC 6 is submitted for consideration as to final action.

B. RECODIFICATION ANALYSES UNDER IC 4-22-2-3.1

James Hebenstreit, P.E., Assistant Director, DNR Division of Water, served as Small Business Regulatory Coordinator for this rule recodification. On August 10, 2009, Hebenstreit provided analyses for the proposed readoption of 312 IAC 6 to consider potential impacts to small business. In making the analyses, he consulted with Major Felix Hensley, Indiana State Boating Law Administrator. James R. Jones, III, Ph.D., Indiana State Archaeologist, DNR Division of Historic Preservation and Archaeology, approved the analyses with respect to 312 IAC 6-3. The analyses provided:

1. Rule Descriptions

The purpose of this memorandum is to provide the analyses anticipated by IC 4-22 with respect to the readoption of 312 IAC 6 pertaining to the Natural Resources Commission. 312 IAC 6 consists of rules 1 through 8.

Rule 1: Applicability

This rule outlines the applicability of the rules to activities subject to licensure under IC 14-19-1-1, IC 14-29-1, IC 14-29-3, IC 14-29-4 or another statute administered by the Department as a result of the waterway being navigable. It establishes the boundary of a navigable waterway as the ordinary highwater mark and establishes standards for the review of proposed activities. It establishes guidelines for the transfer of a permit and criteria for the revocation or suspension of a permit and establishes criteria for when the department may seek a notice of violation and fines. The rule does not impose any requirements or costs on small businesses.

Rule 2: Definitions

This rule provides definitions with applicability to IC 14-29-1, IC 14-29-3 and IC 14-29-4 and 312 IAC 6. The rule does not impose any requirements or costs on small businesses under IC 4-22-2.5-3.1.

Rule 3: Shipwrecks and Other Historic Sites

This rule governs licensure and includes other regulatory provisions intended to protect historic sites (most notably shipwrecks) located within navigable waterways. The rule is administered through the DNR's Division of Historic Preservation and Archaeology. To the extent shipwrecks are protected by the Abandoned Shipwreck Act, they are property of the State and their regulation imposes no costs on small businesses under IC 4-22-2.5-3.1. Shipwrecks which are administered through Admiralty Law are not regulated under

this rule. Regulatory initiatives have not been pursued with respect to historic sites other than shipwrecks.

Rule 4: Marinas

This rule establishes standards for the placement or maintenance of a marina along a navigable waterway and is administered by the Divisions of Water and Law Enforcement. It requires that a new marina along a navigable waterway must obtain a license from the Department and requires that in order to obtain that license the marina must be equipped with a pumpout station that is in good working order, is readily accessible to patrons of the marina licensed or approved by the Indiana Department of Natural Resources or another governmental agency. The rule also allows permittees to obtain up to a 5 year exemption from the pumpout requirement if the marina is likely to serve only boats that are not equipped with or likely to be not equipped with a marine sanitation device or if an agreement is in place with another nearby marina or similar facility that has a lawful pumpout with sufficient capacity and accessibility.

There is a potential cost to small businesses in adding a pumpout facility to a proposed marina. The Department might receive 1 or 2 applications per year to construct a marina on a navigable waterway. The State of Indiana is charged with holding the waters of all navigable waterways in trust for the citizens of Indiana. As such the State must strike a balance between the rights of riparian landowners to use their frontage and the rights of the public to use the waterway. In addition, the enabling statute provides that the Department may approve a permit only if it will not result in significant environmental harm. The requirement to provide a pumpout facility is consistent with the various federal, state and local initiatives to maintain and improve water quality on our nation's waterways.

Rule 5: Mineral Extractions

This rule establishes standards for the extraction of sand, gravel, stone or another mineral from or under the bed of a navigable waterway. It establishes that before an agency action, IC 14-11-4 and 312 IAC 2-3 govern and after an action, IC 14-21.5 and 312 IAC 3-1 govern. Separate licenses are not required if the activity is also governed by IC-14-34 or IC 14-37 and the rule provides that a permit is not required for the mineral extraction if it is within a floodway and exempted or excluded from the licensing requirements of IC 14-28-1. It requires that a written license must be obtained from the Department before a person can lawfully extract sand, gravel, stone, coal, oil, gas, or another mineral from or under the navigable waterway. The rule establishes the permit fee at \$50 and waives that fee if the activity is also licensed pursuant to IC 14-34 and IC 14-37. The rule provides that a bond must be posted by the license applicant with the Department to assure prompt compliance with the terms and conditions of the license. It requires that the bond must be in the form of a surety bond, a cash bond or a certificate of deposit and cannot be approved unless issued by a company holding an applicable certificate of authority from the Department of Insurance, State of Indiana. Bonds for the extraction of coal or oil and gas are determined under the applicable statutes and rules governing the extraction of

those materials. The rule establishes that a license terminates on the date specified or 5 years after the date on which the Department sent notice of the agency action. It also establishes conditions for the review and approval of license applications and provides that the permittee pay the Department a reasonable fee for the extracted materials with the value to be determined by the Department. The fee is waived if the mineral is authorized to be placed by the Department and is lawfully placed for beach nourishment or in a landfill as defined in IC 13-11-2-116.

The rule also establishes a general license for the removal of creek rock from a navigable waterway. In order to act under the rule, if the creek rock is to be removed from a parcel in the riparian zone of an adjacent property owner, the person must either be the owner of the parcel or have written permission of the riparian owner of the parcel. The rule specifies the conditions which must be met for the person to remove the material without a written license issued pursuant to IC 14-28-1, IC 14-29-1 and IC 14-29-3.

There are potential costs to small businesses as a result of paying an application fee, a royalty fee and obtaining a bond. These costs are specifically anticipated by statute. These costs to the small business are likely no different than the costs associated with the extraction of minerals from or under private property. It is typical for small businesses to pay royalty fees to private landowners for the extraction of sand, gravel, coal, and other minerals from or under their property. The state holds the beds of the state's navigable waters in trust for the citizens of the state, and the charging of a royalty fee on behalf of the state's citizens is consistent with other landowners' rights to charge a royalty fee for the minerals on their own property. The amount of the fee is generally determined by reviewing the fees being received by private landowners for the same mineral. As such, the payment of royalty fees to the state is consistent with the businesses costs of dealing with private landowners. Contractors who do the excavation work are generally required to be bonded so again the surety bond requirement for mineral extractions from or under navigable waterways is consistent with the private sector practice.

There will likely be no impact on small businesses as a result of the general license provisions since the conditions limit the amount of material that can be removed and probably would preclude small businesses from benefiting from the general license provisions.

Rule 6: General Authorization for Beach Nourishment to Lake Michigan

This rule creates a general authorization to place sand for beach nourishment within the Indiana Dunes National Lakeshore or Indiana Dunes State Park and removes the requirement for also obtaining a permit to apply or obtain a license under IC 14-29-1. It provides the information that must be provided in a written notice to the Department in order to obtain the general authorization. The rule provides that the Department has 14 days from the date of receipt of the written notice to advise the person if they may proceed, must comply with additional conditions including completion of testing criteria or if the person cannot act except according to a license issued under IC 14-29-1-8. It also provides that the Department shall consider whether the removal, transport or placement

of sand is likely to pose a hazard to the environment or public health and safety. The rule provides that a request for general authorization is deemed approved if the Department does not respond within 14 days of the receipt of written notice. The rule provides that the Department may require a person to post a copy of the written notice along with any terms and conditions placed by the Department. Finally, the rule provides that the Department may revoke or suspend the general authorization if the person does not comply with the terms and conditions of authorization.

The rule should create no costs to small businesses in that it is not a mandate to business to place the material in these locations. While to date no small business has utilized this provision of the rule, it may in fact have a cost benefit to small businesses in that they may be able to place sand that they have removed from another site at these locations thereby reducing their trucking costs because the Indiana Dunes National Lakeshore or Indian Dunes State Park are in closer proximity to their construction site than other disposal sites.

Rule 7: Emergency Construction Activities in Lake Michigan

This rule establishes standards for determining whether an emergency condition warrants the approval of a construction activity along or within the ordinary high watermark of Lake Michigan prior to the completion, review and approval of a permit application issued pursuant to IC 14-29-1. An emergency action is authorized if the Division Director finds an action is supported by extraordinary circumstances which are also described in the rule. The rule also sets procedures for seeking approval of an emergency activity and the status of improvements made as a result of the activity. The rule provides that persons wishing to take advantage of this rule must notify the Department and the applicable county emergency management agency and describe the nature of the emergency and the nature of the proposed construction. The rule provides that upon receipt of a request for emergency approval the Department shall conduct an on-site inspection and consult with other agencies including the U.S. Army Corps of Engineers and the county emergency management agency before responding to the request. The rule provides that the Department may grant the request for emergency construction approval if there is an imminent risk of harm to public safety or major damage to property and certain conditions are met. The rule describes factors which might tend to support a finding that emergency conditions are present and they include: rising lake level, failed or threatened erosion control structure nearby, angle of repose of a bluff face or bluff heights, risk of harm to public safety or major damage to real property or threat to neighboring persons if construction is not undertaken immediately.

The rule provides that the Department may approve, approve with conditions or deny a request for emergency authorization. That action can be done orally if conditions warrant but must be documented in writing as soon as possible. The rule provides that application may be terminated if supporting documentation is not provided and an approval is effective for 90 days unless otherwise specified. The rule provides that once an emergency authorization is obtained, the applicant must file an application for an after-the-fact license within 90 days although the Department is not required to approve the

project as constructed and may require modification or removal of portions of the project. Determinations made under this rule are subject to review pursuant to IC 14-21.5 and 312 IAC 3-1.

This rule should create no costs to small businesses as it creates an emergency mechanism to allow applicants to deal with emergency situations immediately without need to wait the ordinary amount of time it takes to process a license. As a result, this may allow small businesses to save costs associated with additional repairs or damages that might occur during the time period it customarily takes to process a permit application.

Rule 8: Placement of Permanent Structures in Lake Michigan

This rule establishes standards for the review and approval of applications to place permanent structures in Lake Michigan pursuant to IC 14-29-1. The rule defines “permanent structure” and requires that a person must file an application and plans for the construction activity with the Department. The rule provides that the applicant must demonstrate that the permanent structure won’t unreasonably impair the navigability of the lake or an adjacent navigable waterway, cause significant harm to the environment or pose an unreasonable hazard to life or property. The rule requires that the applicant evaluate the likely impact of the structure on coastal dynamics including shoreline erosion and accretion, sand movement within the lake and the interaction with other existing structures. The rule provides that an applicant must have the written permission of or be the fee owner of the land immediately adjacent to the project site.

The rule provides that the Department may approve, approve with conditions or deny the license and notice of the determination must be provided to the applicant and other parties entitled to be notified pursuant to IC 4-21.5-3-5. The Department may also terminate an application if the applicant fails to provide supporting documentation. The rule mandates that if a project would violate the public trust doctrine the Department shall either deny the application or condition its approval such that placement of the structure would not violate the public trust doctrine. The rule also provides that a license may be conditioned to assure that public access will not be impeded and to provide for complete removal of the structure and site restoration at the expense of the riparian landowner when the structure is no longer required. It allows the Department to require monitoring of the structure or of affected lands and waters to determine the impact of the structures upon coastal dynamics or other environmental factors. If monitoring or other documentation identifies a negative impact that was not fully addressed when the license was approved, the Department may require removal, modification or improvement to the structure to mitigate the negative impact.

This rule imposes costs on small businesses that wish to place permanent structures in or along the shoreline of Lake Michigan. The costs incurred are those associated with the preparation of plans for an application and possible costs as a result of having to implement a monitoring plan or the possible removal, modification or improvement to a structure to mitigate a negative impact to the coastal dynamics or other environmental

factors. While there are potential costs associated with this rule, the State of Indiana is charged with holding the waters of all navigable waterways in trust for the citizens of Indiana. As such, the State must strike a balance between the rights of riparian landowners to use their frontage and the rights of the public to use the waterway. The dynamics of Lake Michigan are unique to the state's navigable waterways and understanding those dynamics is complicated and requires specialized expertise of wave dynamics and sand movement. History has shown that construction activities along Lake Michigan have impacted the natural dynamics of the system and the placement of one structure can have impacts to adjoining properties. As a result, the State of Indiana hired a full time staff person years ago who is one of a handful of experts in the field of coastal dynamics. In this role, he provides assistance to applicants including small businesses in the design of structures to accomplish the objectives of the applicant while minimizing or reducing the risk to neighboring property owners. The potential negative impacts of improperly designed and/or constructed structures could result in significant expenditures by the owners of the impacted parcels.

2. General Overview Concerning Comments and Complaints

In addition to the rule descriptions provided above, the following general overview is provided:

The continued need for the rule

The rule is necessary for the continued implementation of the regulatory programs administered by the Department and authorized under the statutory authority of IC 14-19-1, IC 14-29-1, IC 14-29-3, IC 14-29-4, and IC 14-21-1.

The nature of any complaints or comments received from the public, including small businesses, concerning the rule or the rules implementation by the agency

The Department is not aware of any specific complaints or comments regarding 312 IAC 6. In general, the Department routinely receives complaints about the time and delays needed to obtain permits, and there is always a push to have more types of construction activities covered by general license. Any rule that shortens the permit process is viewed favorably by the regulated community, including small business.

The complexity of the rule, including any difficulties encountered by:

(a) the agency in administering the rule

Any difficulties encountered through the course of administering the rule have been addressed by amending the rule when needed.

(b) small business in complying with the rule

The rule is structured so its requirements are most-typically folded into licensure actions in floodways. Floodway licensure is governed by IC 14-28-1 (sometimes referred to as the “Flood Control Act”) and 312 IAC 10. The result is a seamless licensure process, and small businesses and other regulated entities are unlikely to be significantly impacted beyond the requirements of the Flood Control Act. In many instances, license applicants may not even be aware their license authorizes activities both under the laws governing floodways and under the laws governing navigable waterways.

The rule has its most significant consequences for construction activities within the Indiana waters of Lake Michigan. The Department receives very few applications from small businesses for work in Lake Michigan and is not aware of any difficulties. In addition, since the rule has been in place for a number of years, small businesses have likely learned to incorporate the permitting process into their planning and development. Compliance with the rule has generally not been a significant issue.

The extent to which the rule overlaps, duplicates or conflicts with other federal, state, or local laws, rules, regulations or ordinances

While many construction projects along or within Lake Michigan also require permits or approvals from other agencies, the State of Indiana is charged with holding the waters of all navigable waterways in trust for the citizens of Indiana. The Department is the state agency assigned “general charge” of navigable waters by the Indiana General Assembly.

These rules were developed to protect the interests of those citizens and the state employs a well-qualified expert in coastal dynamics for this purpose.

The length of time since the rule was last reviewed under this section or otherwise evaluated by the agency and the degree to which technology, economic conditions or other factors have changed in the area affected by the rule since that time

These rules were recodified in 2003, and review under this section was not required. In the process of conducting its business, the Commission (and the Department) is continually reviewing the effectiveness of standards and guidance to small businesses, private individuals, and professionals in implementing effective rules. Recent changes include a new definition for “marina” and the adoption of standards for the regulation of “creek rock”. Since the 2003 recodification, the Commission has adopted an important new nonrule policy document to help identify riparian zones along the shorelines of navigable waters. The Commission is also currently considering new standards pertaining to the placement of group piers, the consideration of lawful nonconforming uses, and the most effective means for protecting ancient shipwrecks. New G.I.S. and sonar technologies are being adapted to assist with the regulation of navigable waters.

3. Review of Most Recent Small Business Impact Analyses

The factors analyzed in the economic impact statements regarding amendments to 312 IAC 6-2-6 (LSA Document #07-646(F)) and to 312 IAC 6-2-3.3 and 312 IAC 6-5-9. (LSA Document #08-614(F)) have not changed since the statements were prepared.

Any regulatory alternatives included in the statement under IC 4-22-2.1-5(a)(5)

For economic statements prepared in association with LSA Document #07-646(F), no alternative regulatory methods were proposed. For LSA Document #08-614(F), a general licensure process was established. A small business or another regulated entity was not required to use a general license and could instead complete the process for individual licensure. Authorizing a general license, which does not pose unreasonable environmental consequences, allows regulated entities to remove significant quantities of creek rock without licensure fees or complex licensure processes. Beyond this flexible approach, no regulatory flexibility analysis of alternative methods was conducted by the Department for LSA Document #08-614(F).

Any regulatory alternatives not considered by the agency at the time the statement was prepared could be implemented to replace one (1) or more of the rule's existing requirements

There are no regulatory alternatives to be considered for implementation of these rules.

C. COMPLIANCE WITH PROCEDURAL REQUIREMENTS REGARDING READOPTION AND RECOMMENDATION FOR FINAL ACTION

A “Notice of Intent to Readopt” was published in the Indiana REGISTER on March 4, 2009 as anticipated by IC 4-22-2.5-2 and IC 4-22-2.5-4. The notice indicated the intention to readopt the entirety of 312 IAC 6 without changes. The notice provided that a person had 30 days to submit a written request to the Commission seeking to have a particular section of the rules be readopted separately from the general recodification. If such a request had been received, the Commission would have been required to complete the full rule adoption process for the section. No written request was received. Where no request is received, the Commission may either submit the rules for filing with the publisher under IC 4-22-2-35 or elect the procedure for recodification under IC 4-22-2.

AGENDA ITEM #16

For the purposes of the recodification, retention of the current language is found to be appropriate.

The recommendation is for the Commission to approve submittal of the rule for filing with the Publisher.

Dated: August 28, 2009

Stephen L. Lucas
Hearing Officer